STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARLAND DEON WELCH,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 241083
Saginaw Circuit Court
LC No. 00-019291-FH

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver 225 to 650 grams of cocaine, MCL 333.7401(2)(a)(2), possession of marijuana, MCL 333.7403(2)(d), felon in possession of a firearm, MCL 750.224f, receiving and concealing a stolen firearm, MCL 750.535b, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a habitual offender to terms of twenty to thirty years in prison on the cocaine conviction, twelve to eighteen months in prison on the marijuana conviction, twenty-four to ninety months in prison on the felon in possession of a firearm conviction, one to fifteen years in prison on the receiving and concealing conviction, and to the mandatory two-year term on the felony-firearm conviction. The sentences on the marijuana, felon in possession of a firearm and receiving and concealing convictions were concurrent to each other, while the cocaine sentence is consecutive to the marijuana and felon in possession sentences,[1] and the felony-firearm sentence is consecutive to all of the other sentences. Defendant now appeals, and we affirm his convictions but remand for modification of his sentence.

Members of the BAYANET drug enforcement team executed a search warrant at defendant's house in Saginaw. The search yielded, among other things, cocaine, marijuana, and firearms. The search warrant was issued upon information given to the police by a confidential informant who stated that he had personally observed drugs in defendant's house and witnessed defendant selling marijuana to another individual.

[1] The judgment of sentence is silent as to whether the cocaine sentence and the receiving and concealing sentence are concurrent or consecutive to each other. We presume that they are to be concurrent to each other.

Defendant first argues that there was legally insufficient evidence to convict him of receiving and concealing a stolen firearm because there was no evidence to establish that defendant knew that the firearm was stolen. We disagree. There is sufficient evidence to support a conviction if, taking the evidence in the light most favorable to the prosecution, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Furthermore, a conviction may be supported upon reasonable inferences from the evidence, including determinations whether the defendant had the requisite knowledge required for guilt. *Id.* at 428-429.

In the case at bar, defendant's estranged wife testified that a handgun seized from defendant's house during the execution of the search warrant belonged to her and that it had been previously stolen. Moreover, she testified that she discovered it missing following a break-in at her home, which occurred after she and defendant had separated. It is reasonable to infer from this evidence that defendant knew that the weapon was stolen. First, it would be unbelievably coincidental that defendant would have happened to have bought a gun that, unbeknownst to him, had been stolen from his estranged wife. Therefore, it would be reasonable to infer that either defendant himself stole the gun from his wife's house, or that it was stolen by someone working in concert with defendant. Second, even if we accept the idea that coincidentally defendant did purchase a firearm that had been stolen from his wife, it is not unreasonable to conclude that defendant knew that the weapon had been stolen from someone. Defendant, as a convicted felon, would have had to have purchased the weapon illegally. Therefore, even if defendant did not know from whom the gun had been stolen, it is reasonable to infer from the illegal nature of such a transaction that defendant had to have known that it must have been stolen in order for it to have entered the illegal weapons trade.

Next, defendant argues that his conviction for felony-firearm must be vacated because the trial court did not instruct the jury on which predicate felony the felony-firearm charge must be based. As defendant points out, the felony-firearm charge could have been based upon any of three felony charges: the cocaine charge, the felon in possession charge, or the receiving and concealing charge. The trial court's instruction on the felony-firearm charge essentially told the jury that defendant could be convicted if they found that he committed any of the charged felonies. Defendant, however, not only failed to object to the instruction as given, but defense counsel affirmatively stated his satisfaction with the instructions as given except for matters he had previously placed on the record. Accordingly, defendant has waived any challenge to the instruction. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000).

The other argument raised by defendant with respect to the felony-firearm charge is not so easily resolved. Defendant argues that the trial court erred by making the sentence on the felony-firearm charge consecutive to all the sentences on the other four convictions. Except with respect to the marijuana and felon in possession convictions, we disagree. In *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000), the Supreme Court observed a felony-firearm sentence is consecutive only to the sentence for the predicate felony:

> From the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. Subsection 2 clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to

> commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in subsection 1, i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense.
>
> In this instance, the jury found that the defendant possessed a firearm while he possessed two bombs with unlawful intent. While it might appear obvious that the defendant also possessed a firearm while committing the other crimes of which he was convicted, neither a trial court nor an appellate court can supply its own findings with regard to the factual elements that have not been found by a jury. [Footnotes omitted.]

Thus, defendant argues, because there was only one felony-firearm conviction, which must be linked to one predicate felony, it was improper to make the felony-firearm sentence consecutive to all three of the felony convictions. An important distinction, however, between *Clark* and the case at bar is that in *Clark* each of the two felony-firearm charges were specifically linked to a particular predicate felony. In the case at bar, on the other hand, the single felony-firearm charge was linked to two of the underlying felonies. Moreover, the Supreme Court in *Clark*, *supra* at 464 n 11, specifically approves linking a single felony-firearm charge to multiple felonies:

> At the discretion of the prosecuting attorney, the complaint and the information could have listed additional crimes as underlying offenses in the felony-firearm count, or the prosecutor could have filed more separate felony-firearm counts.

We read that footnote as endorsing the practice of linking multiple predicate felonies to a single felony-firearm charge, allowing the sentence on that single felony-firearm count to be consecutive to all of the listed predicate felonies for that felony-firearm count. In the case at bar, the cocaine and the receiving and concealing charges were linked as predicate felonies to the felony-firearm count. Therefore, it was appropriate to make the felony-firearm sentence consecutive to both of these sentences.[2]

But, as *Clark* observed, only felonies are predicate offenses to a charge of felony-firearm and the felony-firearm sentence can only be consecutive to the sentence for a predicate felony. Accordingly, the trial court did err in making the felony-firearm sentence consecutive to the sentence for misdemeanor marijuana possession, as the prosecutor concedes. Therefore, we also modify defendant's sentence to make the felony-firearm sentence and the marijuana possession sentence concurrent to each other.

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[2] For reasons not at all clear to us, the felon in possession charge was not listed in the information as a predicate felony for the felony-firearm charge despite the fact that it was listed as such in the complaint and the district court bound defendant over on the basis of all three felonies as predicates for the felony-firearm charge. In any event, due to this oversight in the drafting of the information, the felony-firearm sentence is modified to be concurrent to the felon in possession sentence.

Defendant next argues that the trial court erred in failing to give him a hearing to determine whether to determine whether the search warrant was procured through the use of false statements. Defendant filed a motion to suppress evidence seized during the execution of the warrant. That motion was discussed at a hearing on a motion to adjourn the trial. At that hearing, it was noted that the suppression motion had just been filed and that the prosecutor had not had an opportunity to respond to the motion. Although it was agreed that the trial needed to be adjourned to permit response to the motion, the prosecutor did not believe that an evidentiary hearing on defendant's motion was necessary, while defendant's motion did request an evidentiary hearing. The prosecutor was given two weeks to respond to the motion. The trial court indicated that if, after the prosecution filed its response, defense counsel believed that an evidentiary hearing was needed, counsel would contact the court and a hearing would be set. Otherwise, the trial court would presumably rule based upon the briefs and the preliminary examination transcript.

Approximately five months later, the trial court, without holding an evidentiary hearing, denied defendant's motion in a written opinion dated October 12, 2001. There is no indication from the lower court record that defendant ever renewed his request for an evidentiary hearing on the motion. For that matter, another motion to adjourn was heard on October 16, 2001, for the purpose of allowing defense counsel more time to review the trial court's opinion on the motion and adjust his trial preparation accordingly. At no time during that hearing did trial counsel indicate any objection based upon the trial court having decided the motion without a hearing despite the fact that defendant had renewed his request for a hearing. Accordingly, defendant is incorrect in his assertion on appeal that the trial court denied his request for a hearing on this issue. Rather, the trial court indicated it would schedule a hearing upon defendant's request after the prosecutor's response to the motion was filed. There is no indication that such a request was ever made; therefore, we can only conclude that defense counsel determined, after receiving the prosecutor's response, that the motion could, in fact, be decided based upon the preliminary examination transcript and the parties' written submissions and that an evidentiary hearing was not, in fact, necessary.

Defendant next argues that the trial court erred in denying defendant's request that the court interview the confidential informant in chambers. We disagree. In denying defendant's request, the trial court relied on *People v Poindexter*, 90 Mich App 599; 282 NW2d 411 (1979). In *Poindexter*, this Court concluded that a mere allegation that a confidential informant does not exist is not sufficient to require the trial court to order the production of the informant for an in camera interview. Rather, the "defendant's attack must be more than conclusory" and "it is not mandatory to produce the informant whenever a defendant makes a bald statement that no informant exists." *Id.* at 609-610. In the case at bar, defendant made no showing that there is a basis for believing that no informant actually existed beyond defendant's statement in his motion that it is his belief that the prosecution would be unable to produce the "nonexistent confidential informant" for cross-examination or for an in camera interview. Thus, the trial court correctly concluded that defendant failed to establish a basis under *Poindexter* to require production of the informant for an in camera interview.[3]

[3] We also note that even if we were to accept as true defendant's allegations that certain (continued…)

Furthermore, the case relied upon by defendant, *People v Underwood*, 447 Mich 695; 526 NW2d 903 (1994), does not support defendant's position. First, *Underwood* dealt with the circumstances under which an informant's identity must be disclosed to the defendant, not with the production of an informant to determine if he actually exists. Second, if anything, *Underwood, supra* at 706-707, underscores the principle that the defendant must first demonstrate the need for the informant to be produced for an in camera interview before the court will order such production.

Defendant's final argument is that the trial court erred in denying his motion to suppress the evidence where the evidence was the fruit of an illegal search and seizure. Defendant, however, presents no argument beyond the generic proposition that the illegally seized evidence must be suppressed. Defendant not having established that the search was, in fact, illegal, there is no basis for applying this principle.

Defendant's convictions are affirmed, but this matter is remanded to the trial court for modification of defendant's sentence to make the sentences on the marijuana and felon in possession convictions concurrent with, rather than consecutive to, the felony-firearm sentence. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski

(…continued)

statements in the affidavit in support of the search warrant were false, that does not establish the nonexistence of the informant. At worst, if those statements are false, it merely indicates that the police did not corroborate the informant or his information to the extent alleged. It does not establish that the informant does not exist.